



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

MDV-24/85002

PRELIMINARY RECITALS

Pursuant to a petition filed May 22, 2007, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Green Lake County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on June 27, 2007, at Green Lake, Wisconsin.

The issue for determination is whether the petitioner divested property in order to become eligible for Institutional MA.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Represented by:

[REDACTED]

Respondent:

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Deborah Lyons, ESS
Green Lake County Dept Of Human Services
Human Services Center
500 Lake Steel Street, Po Box 588
Green Lake, WI 54941

ADMINISTRATIVE LAW JUDGE:

Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Green Lake County. The petitioner resides at this time in a nursing home.

2. The petitioner, who was a widow during the time period in question owned property in trust at [REDACTED] in Green Lake. In 1990, the petitioner transferred ownership from the trust to herself and her children as joint tenants. (See Exhibit #6.)
3. There were some intra-family disputes as to ownership and each child's right to sell his or her interest in the property. After legal action was commenced, a stipulation was reached by all of the family members that were alive at that time. Green Lake County Judge W. M. McMonigal issued an order on April 21, 1997, that ratified the agreement reached by the [REDACTED] family members.
4. In the 1997 stipulation, the petitioner agreed to surrender any interest in the Green Lake property but retained a life estate. In that Order, the petitioner agreed to accept as her only interest in the Green Lake property, a life estate. Her life estate would terminate at her death or when she abandoned the property under circumstances whereby it would be medically impossible for her return to that property.
5. The petitioner had a stroke on August 23, 2005. After a short hospital stay, she was transferred to a nursing home on August 30th. Due to medical reasons, the petitioner will not be able to return to that property. (See Exhibit D.)
6. On August 23, 2005, the petitioner "signed" a durable power of attorney naming her son, [REDACTED] and her daughter, [REDACTED], as co-attorneys-in fact.
7. The petitioner received nothing of value when she entered the nursing home and abandoned the Green Lake property.
8. The petitioner started to receive Institutional MA as of April 1, 2006. Prior to that date, the petitioner had been certified for Senior Care, a MA variant.
9. In August, 2006, the property was sold to individuals outside of the [REDACTED] family. The petitioner received nothing of value as a result of that sale.
10. On May 12, 2007, the county agency sent a notice to the petitioner's POA stating that MA would be terminated effective June 1, 2007, because the petitioner divested assets in order to gain eligibility for MA.

DISCUSSION

A person seeking medical assistance is ineligible if his assets exceed the MA program's limit. To prevent those with enough funds to pay for their own medical care from becoming a burden to the general public by passing their assets to potential heirs, MA law prevents a recipient from reaching this limit by divesting assets. A divestment is a transfer of assets for less than fair market value. Wis. Stat. Sec. 49.453(2)(a); *Medicaid Eligibility Handbook*, § 4.7.2. A divestment occurs when an applicant, or a person acting on the applicant's behalf, transfers assets for less than their fair market value on or after the lookback date. §49.453(2)(a), Stats.; *Medicaid Eligibility Handbook*, § 4.7.2. The lookback date is generally 36 months, but is 60 months if an irrevocable trust is involved. §49.453(1)(f), Stats; see also *Medicaid Eligibility Handbook*, § 4.7.3. The lookback date for an institutionalized person begins on the first day that the person is both institutionalized and applies for medical assistance. §49.453(1)(f)1., Wis. Adm. Code. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The period of ineligibility is specified in Wis. Stat. Sec. 49.453(3) to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services. See the *Medicaid Eligibility Handbook*, 4.7.5. The period of ineligibility begins on the date of the divestment.

A divestment that occurred in the lookback period or any time after does not affect eligibility if any of the following exceptions that could be applicable to this case exist:

1. The person who divested shows that the divestment wasn't made with the intent of receiving MA.

The person must present evidence that shows the specific purpose and reason for making the transfer. Verbal assurances that s/he was not trying to become financially eligible for Medicaid are not sufficient. S/he must show that s/he expected private health insurance or other resources would cover his/her institutional expenses. Take into consideration statements from physicians, insurance agents, insurance documents, and bank records that confirm the person's statements...

3. The ownership of the property is returned to the person in the fiscal group who originally disposed of it...

6. The agency determines that denial of eligibility would work undue hardship on the person. "Undue hardship" is a serious impairment to the institutionalized person's immediate health.

The ESS must verbally inform the person of this undue hardship provision if the ESS has determined the person has divested. The undue hardship notice must be included on all manual MA institution denials and closures due to divestment.

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the county, like the denial of MA due to a divestment of assets was improper given the facts of the case. See, 20 C.F.R. §§416.200-416.202; see also, 42 C.F.R. §435.721(d). The burden of proof is on the applicant or recipient to show that one of the above circumstances exists. While oral testimony concerning the intent of the applicant is important, great weight must be afforded by the actions taken by the applicant given the overall circumstance at the time. Thus, the most commonly heard explanation that the transfer of assets was done for probate purposes must be well documented and be evident in light of all of the facts.

The state MA rules provide for the treatment of life estates as follows:

(6) LIFE ESTATE. The applicant or recipient may hold a life estate without affecting eligibility for MA. If the property or the life estate is sold, any proceeds received by the applicant or recipient shall be considered assets. In this subsection, "life estate" means a claim or interest a person has in a homestead or other property, the duration of the interest being limited to the life of the party holding it with that party being entitled to the use of the property including the income from the property in his or her lifetime.

See §HSS 103.06(6), Wis. Admin. Code (Effective date: December 1, 2000).

I need not address any transfer of the property from the petitioner to her children in either 1990 or 1997 as both are before the look back period. The only transaction that is of interest is the termination of the petitioner's life estate in 2005. The petitioner, through her attorney, presents as its main argument that there was no divestment because the life estate was terminated pursuant to a court order filed in Green Lake County on March 6, 1997. I find this argument to be unpersuasive. The attorney's position is that Judge McMonigal imposed the terms of the petitioner's life estate at that time. However, I find Judge McMonigal did not write a decision in which he identified the facts and by applying the applicable law, imposed an Order on all of the parties. Instead, I see in Exhibit K an Order confirming a stipulation agreed to by the members of her family and herself. This is substantiated by the Judge's statement on page 12 and 13 of Exhibit K, which in pertinent part is as follows:

The parties should be aware that many times issues that are as complex as those presented in a case like this, leaving the possibility of an outcome different than anyone's expectation, justifies and effort to try to reach some kind of settlement that will give everybody a fair or more satisfy (sic) result, *and as long as the parties remain in control of the case and settlement, there's more flexibility that what the court can impose if it is forced to rule on the evidence and come to a conclusion based on law.* (Emphasis added.)

Given the above language, I find it disingenuous for the attorney to argue that she was bound by terms that could have been modified at any time prior to when she abandoned the property through a modification of the family agreement. Should the attorney argue that it would have not been possible to make the change, I find that there is no evidence that she ever tried, which is not surprising given that making a change would have ended her immediate eligibility for Institutional MA based on excess assets.

The attorney also argued that between 1997 and 2005, the petitioner in effect surrendered her life estate in all or at least most of the Green Lake property in that she failed to perform the activities required of the life estate holder by law. If the petitioner actually maintained her life estate, she would have been responsible for the upkeep of the property and the taxes. However, her children lived in or used significant parts of the property and provided for the care maintenance of it, including making a variety of payments when necessary. However, family members helping an aging parent is not enough to show that the parent has in some way lost any of her legal interest in the property. First, there is a strong self-interest on the part of the children to assist their mother given that they owned it, subject to her life estate. When the property would be sold, any assistance with the property helped to protect their future return. Further, no document was presented that formalized an agreement for the petitioner to exchange some portion of her life estate interest in exchange for the assistance rendered. Barring such a specific written agreement, it is assumed that any assistance provided by a family member is gratuitous. See In Re Schoenkerman's Estate, 236 Wis. 311 (1940) and In Re Breitzman's Estate, 236 Wis. 96 (1940). In those kinds of cases, natural affection between relatives is insufficient consideration to establish a contract requiring conveyance of property in exchange for services. As stated by the Wisconsin Supreme Court in the decision in *Estate of Tulloch*, 260 Wis. 378, 380, 50 N.W.2d 671(1951):

...there is a presumption that services and accommodations are rendered gratuitously by the members of the family to each other.

One factor to consider in determining whether a divestment took place is to see if the individual would have had any other financial resources to rely on at the time of the transfer. Per EDS, the petitioner first got Institutional MA on April 1, 2006. (Prior to that date, the petitioner had Senior Care which has no asset test.) Thus, while the petitioner had some resources to meet the cost of her nursing home, it was not enough to meet her financial obligations arising from her extended nursing home stay.

There is no question as to when the divestment took place. The petitioner still retained the life estate until she abandoned the property in August, 2005. Until that time, the petitioner retained the right to sell the life estate, the legal right to the money obtained from that sale, and the legal ability to make the money available for support and maintenance. See the *Medicaid Eligibility Handbook*, § 4.5.2 and 20 C.F.R. §416.1201(a). Thus, the transfer of the asset occurred in August, 2005.

The attorney argues that she did not receive any money from the sale of the property in August, 2006. She also argued that the language in the *Medicaid Eligibility Handbook*, §4.5.8.1.5 supports her position. It states in pertinent part the following:

If a remainder person sells the property for which a life estate is retained, the life estate holder is not entitled to any of the payments.

However, if the life estate holder gives up his/her life estate to secure the sale of the property, then the life estate holder would be entitled to some portion of the proceeds from the sale of the property. Treat money received as a result of property settlement as an asset (4.5.7.10).

It is unclear as to how the above language furthers the petitioner's case. I agree that the petitioner did not have the life estate as an asset when the property was sold. Thus, it expected that she would not get any money as she had surrendered any rights she had in the property without consideration one year earlier. If the petitioner had held on to the life estate for another year and received part of the sale proceeds, this hearing on a divestment would not be necessary. Of course, she would have been ineligible for Institutional MA as she would have been over the asset limit. (As her husband had predeceased her and the documentation presented showed she would not return home, the life estate would not have been an exempt asset.)

Language that is more applicable here and that is in the same section of the *Medicaid Eligibility Handbook* is "[I]f life estate values need to be determined for divestment calculation". The *Medicaid Eligibility Handbook* is clear that the transfer of a life estate without adequate compensation is a divestment.

I note that per Wis. Stat. § 49.453(2)(a), the transfer in question does not have to be done by the institutionalized individual but can also be done by a person acting on her behalf, such as a POA. Thus, after August 23, 2005, any action concerning the abandonment of the life estate that was performed by her POA would trigger a divestment as well.

The only remaining point is the value of the asset that was divested. The attorney did present any significant arguments or documentation to challenge the actual mathematics used by the county agency. The county agency used a value of \$359,785.82 which when divided by the average monthly nursing home rate paid by a private party (\$5,584) yields a period of ineligibility of 64 months. I note that the 1997 Order in Exhibit C identifies the property subject to the stipulated settlement was all of the property owned by the Seno family and that the petitioner had a life estate in that property. Thus, I find no basis to change the length of the disqualification period.

CONCLUSIONS OF LAW

1. The petitioner divested her life estate in August, 2005, in order to become eligible for MA.
2. The petitioner is ineligible for institutional MA for 64 months from the date of the divestment.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wisconsin Statutes § 227.49. A copy of the statutes can be found at your local library or courthouse.

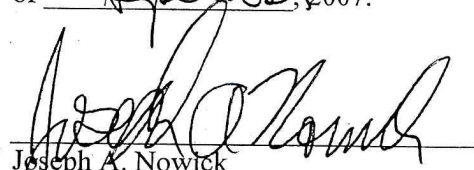
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Wisconsin Department of Health and Family Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 650, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of
Madison, Wisconsin, this 5th day
of September, 2007.



Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
95/JAN

cc:

[REDACTED]